# INDEX


| | Page |
|---|---|
| I. A district court is not authorized to stay an order of the National Mediation Board directing an election upon the ground that the ballot used by the Board contains no space in which the employees may expressly vote *NO UNION* | 1 |
| II. A carrier has no right to participate in a representation proceeding | 8 |
| Conclusion | 19 |


## CITATIONS


| | |
|---|---|
| Cases: | |
| *Leedom* v. *Kyne*, 358 U.S. 184 | 2, 3, 7 |
| *National Labor Relations Board* v. *Standard Lime & Stone Co.*, 149 F. 2d 435, certiorari denied, 326 U.S. 723 | 4, 6 |
| *R. K. LeBlond Machine Tool Co.*, 22 NLRB 465 | 6 |
| *Switchmen's Union* v. *National Mediation Board*, 320 U.S. 297 | 2, 6, 7 |
| *UNA Chapter, FEIA* v. *National Mediation Board*, 294 F. 2d 905, certiorari denied, 368 U.S. 956 | 12 |
| *Virginia Ry.* v. *System Federation No. 40*, 300 U.S. 515 | 5 |
| Statutes: | |
| Railway Labor Act: | |
| Section 1, Fifth, 45 U.S.C. 151 | 9 |
| Section 2, Second, 45 U.S.C. 152, Second | 19 |
| Section 2, Fourth, 45 U.S.C. 152, Fourth | 2, 9, 10, 19 |
| Section 2, Ninth, 45 U.S.C. 152, Ninth | 3, 7, 13, 15, 16, 17, 18, 19 |

Miscellaneous:


| | Page |
|---|---|
| 5th Annual Report, National Labor Relations Board | 4, 6 |
| 14th Annual Report, National Mediation Board (1948) | 5 |
| 2 Determination of Craft or Class of the National Mediation Board | 18 |
| 3 Determination of Craft or Class of the National Mediation Board | 10, 13, 14, 15, 16, 17 |
| 40 Op. Attorney General 541 | 5 |

# In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 138

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYES, PETITIONER

*v.*

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES

No. 139

UNITED AIR LINES, INC., PETITIONER

*v.*

NATIONAL MEDIATION BOARD, ET AL.

No. 369

NATIONAL MEDIATION BOARD, ET AL., PETITIONERS

*v.*

ASSOCIATION FOR THE BENEFIT OF NON-CONTRACT EMPLOYEES

*ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT*

## REPLY BRIEF FOR THE NATIONAL MEDIATION BOARD AND ITS MEMBERS

### I

### A DISTRICT COURT IS NOT AUTHORIZED TO STAY AN ORDER OF THE NATIONAL MEDIATION BOARD DIRECTING AN ELECTION UPON THE GROUND THAT THE BALLOT USED BY THE BOARD CONTAINS NO SPACE IN WHICH THE EMPLOYEES MAY EXPRESSLY VOTE *NO UNION*

The premise of our argument upon this point is the settled rule, established in *Switchman's Union* v. *Na-*

*tional Mediation Board,* 320 U.S. 297, that there may be no judicial interference with orders of the National Mediation Board made within its jurisdiction in representation proceedings.

> [T]he intent seems plain—the dispute was to reach its last terminal point when the administrative finding was made. There was to be no dragging out of the controversy into other tribunals of law. [*Id.* at 305.]

We assume *arguendo* that *Leedom* v. *Kyne,* 358 U.S. 184, introduced an exception; but the exception is confined to cases in which the Board has acted—

> in excess of its delegated powers and contrary to a specific prohibition in the Act. [*Id.* at 188.]

In our opening brief we showed that, in this case, the authority to determine the methods of resolving representation disputes, including the form and significance of any ballots, was delegated by Congress to the Mediation Board. The Board has violated no specific statutory prohibition.

There is not a word in the Act giving anyone a specific or explicit right to have a NO UNION box printed on the ballot, or laying any specific prohibition concerning the form of the ballot upon the Mediation Board. United says that the ballot contravenes a provision in Section 2, Fourth, which reads:

> The majority of any craft or class of employees shall have the right to determine who shall be the representative of the craft or class for the purposes of this Act.

Certainly that is not a "specific prohibition" against the present form of ballot. Nor can an election in which every employee is given a chance to indicate which of the rival unions, if any, he wishes to designate and is clearly notified that he need make no designation be fairly said to deprive the majority of the craft or class of the right to determine "who shall be the representative."

The details of United's and ABNE's criticisms of the ballot show that they are not complaining of the violation of a specific and explicit statutory requirement, as in *Leedom* v. *Kyne,* but are criticizing the Board's application of the broad policies of the Act and its expert judgment as to the most appropriate way of performing its duty under Section 2, Ninth, of determining "who are the representatives of such employees designated and authorized in accordance with the requirements of [the Act]." Thus, United bases its argument entirely upon the details of a hypothetical situation in which it says that the Board will be misled by the present form of ballot into certifying a union that is not the choice of a majority. Suppose, United says (Br. 51–52), that there was a class or craft of 13 employees, 4 of whom desired Union A *and no other,* and 3 of whom desired Union B *and no other.* If an election were held 6 employees would refrain from voting, 4 would vote for Union A, and 3 would vote for Union B. The 4 who voted for Union A, United says, would determine the representative. The argument is too premature and speculative to be taken seriously.

1. No election has been held in this case. No one knows how many employees will vote, and how the valid ballots will be distributed.

2. The set of facts posited by United is artificial. United asks us to assume that all the employees voting for Union A are for that union *and no other*, and that the employees voting for Union B are for that union *and no other*. The "and no other" is deceptive. No election ever has been conducted, and none ever will be conducted, in which there is anything to reveal whether the employees who vote for a particular union prefer no collective bargaining to the designation of any other union. Many observers would say that the probabilities are just the reverse. The National Labor Relations Board, for example, held the view that "where in an original election the combined vote for two labor organizations constitutes a majority of the votes cast, the employees have expressed a desire to bargain collectively through some representative." (*National Labor Relations Board* v. *Standard Lime & Stone Co.*, 149 F. 2d 435, 439 (C.A. 4), certiorari denied, 326 U.S. 723, citing National Labor Relations Board Fifth Annual Report, p. 60).

3. Deciding what to do where the balloting does not produce an absolute majority of all the employees for a particular representative is peculiarly a question for the Mediation Board rather than the courts. Different courses have been followed at different times and by different agencies during the development of our labor relations policies.[1] It has sometimes been suggested that, at least where a

[1] See the cases cited on p. 31 of our opening brief.

majority votes, a certification may be issued to the representatives designated by a majority of those voting because the non-voters should be presumed to have left the choice to the will of the voters. *E.g., Virginian Ry.* v. *System Federation No. 40,* 300 U.S. 515, 559–561. That rationale cannot be entirely squared with the instruction that those who oppose the designation of any representative should refrain from voting, for the non-voters may include employees affirmatively opposed to the designation of representatives as well as employees who are indifferent and content to leave the matter to others. The Mediation Board, however, has never, as far as we can determine, committed itself to that particular rationale, but remains free to choose the appropriate course when the voting is over and the facts are developed.[2]

The fairness of any particular course obviously depends upon the factual inferences to be drawn from a particular distribution of the ballots. Where a majority of the eligible employees has designated one or another of the putative representatives, it may be a fair inference that all who designated some union prefer collective to individual bargaining, and there-

[2] In 1947, the Attorney General stated his opinion that the Board could in its discretion certify the union receiving the most votes in an election where a majority of the eligibles failed to participate, relying upon the rationale that those who fail to vote can be presumed to assent to the determination of those voting, 40 Op. Attorney General 541. The Board considered this opinion but nevertheless decided to continue its practice of refusing to certify a representative unless an absolute majority of eligibles voted for some representative. See, 14th Annual Report, National Mediation Board (1948), pp. 8–9.

fore the union with the most designations is the majority choice. Cf. *National Labor Relations Board v. Standard Lime & Stone Co.*, 149 F. 2d 435 (C.A. 4), certiorari denied, 326 U.S. 723; *R. K. LeBlond Machine Tool Co.*, 22 NLRB 465; National Labor Relations Board Fifth Annual Report, p. 60. Perhaps some kind of a runoff may be appropriate. Possibly the proper course depends upon more detailed knowledge of the distribution of the ballots. These are the very questions that the Mediation Board was set up to answer. An attack on the Mediation Board's action, even after it occurred, would show no more than that the Board might have made a mistake in performing the duties confided to it by Congress, an allegation which, under *Switchmen's Union*, is not ground for judicial review.

4. Since no election has been held in this case, the Board has drawn no conclusions from the balloting. The courts may not interfere with a representation election on the ground that circumstances *may* develop later in which the Board *may* draw conclusions from the balloting which *may* lead to the certification of a representative which *may* not be the majority choice.

ABNE's brief also asks the Court to venture into areas which the statute assigns to the Mediation Board. One branch of the argument is that the ballot the Board proposes to use puts the employees opposed to labor unions at a disadvantage. Whether that is true, and, if so, whether it goes beyond the policy of the Act, are questions for the Board to decide (see our opening brief pp. 30–37). The other branch

of ABNE's argument is that the instructions on the ballot are confusing. The alleged confusion seems to arise from counsel's picking apart a sentence from the government's brief, not from any ambiguity in the instructions. The complete answer, however, is that the writing of instructions for the ballot is the Mediation Board's responsibility and alleged imperfections or ambiguities are not ground for judicial interference with the conduct of a representation proceeding. Indeed, the fact that these are the only targets of ABNE's criticisms measures the extent of its failure to show that the Board has acted "in excess of its delegated powers" or "contrary to a specific prohibition in the Act" (*Leedom* v. *Kyne, supra*).

The short of the matter is that United and ABNE, being unable to point to any specific prohibition which the Board has violated, are forced to argue in terms of broad generalities contrasting what they say would be the effect of the proposed form of ballot with what they say are the conclusions to be drawn from the general provisions and policies of the Act. We think that they are wrong and that the Board has been entirely faithful to the policy of the Act. But that question, we emphasize, need not be decided because it is the essence of the *Switchmen's* doctrine that, in proceedings under Section 2, Ninth, Congress has committed to the Board for its final and binding decision the responsibility for particularizing and applying to concrete situations the policies and general instructions contained in the Act.

765-561—65——2

## II

### A CARRIER HAS NO RIGHT TO PARTICIPATE IN A REPRESENTATION PROCEEDING

Since our argument upon this point is fully developed in our opening brief, it is here necessary only to correct two misapprehensions introduced by the brief for United Air Lines.

1. On page 35 of its brief United totally misstates the government's position. The very heart of our argument, upon which our case must stand or fall, is that because the two unions were in agreement as to the craft or class in which the employees wished to organize, the Mediation Board was bound to accept their wish as a matter of substantive law and the Board had no further function to perform. That is the view the Mediation Board took in this case (R. 139) and, we submit, is the command of the Railway Labor Act.

The confusion probably arises from our failure to explain with sufficient clarity several related but quite different aspects of the function of the Mediation Board in representation proceedings. Under the Railway Labor Act disputes about the bargaining unit may involve these questions:

(i) Whether a party to the representation proceedings is seeking to have included in a bargaining unit and to represent certain persons who should *not* be members of *any* bargaining unit. In other words, a union might be attempting to have included within a craft certain management personnel who are not

really "employees" within the scope of the Railway Labor Act.

(ii) Whether the unit or units in which the employees are seeking to organize is *a* cognizable "craft or class". This is a very loose grouping, and there are a great variety of crafts or classes, many overlapping and inconsistent, in which self-organization may take place.

(iii) In which of the putative crafts or classes do the employees wish to organize?

With respect to the first category, the National Mediation Board might be asked by a union or unions to resolve a representation dispute among a group which includes within it persons in the service of the carrier who are not emcompassed within the term employee, as that term is used in the Railway Labor Act. Section 2, Fourth of the Act grants only to any craft or class of *employees* the right to organize and to determine the representative of the craft or class; and Section 1, Fifth of the Act limits the scope of the term "employee." Thus, the Mediation Board could not, consistent with the statute, permit a union or unions to include within a bargaining unit persons in the carrier's service who are not subject to the Act, even if the competing employee organizations are in agreement as to the scope of the bargaining unit. Upon that quasijurisdictional question which the unions cannot resolve by agreement, it may be proper to accord the employer a hearing. Such was the situation in three cases cited in United's brief (p. 41) where the Board held hearings on the scope of the bargaining units, even though there was no dispute

among unions and, in fact, only one union was involved in each case. See, *In the Matter of Representation of Employees of the American Airlines, Inc.*, File No. C–2783 (1959), 3 Determination of Craft or Class of the National Mediation Board, p. 49 (where the question was whether "Technical Foremen" performed management functions); *In the Matter of the Application of Transport Workers Union of America,* Case No. R–3445 (1960), 3 Determination of Craft or Class of the National Mediation Board, p. 87 (where the issue was whether various job classifications such as "Agency Sales Manager," "Lost and Found Supervisor," "Industrial Nurse," etc., were employees or subordinate officials and thus covered by the Act or whether they were excluded as supervisory personnel); *In the Matter of Representation of Employees of The Trans World Airlines, Inc.*, Case No. R–3479 (1961), 3 Determination of Craft or Class of the National Mediation Board, p. 94 (similarly involving the question whether various job classifications, *e.g.*, "General Foremen," "Chief Inspector," "Chief Storekeeper," etc., were supervisory personnel and thus should be excluded from the bargaining unit). Since there is no such question in the present case, the three cases cited by United are irrelevant.

As to the second category, the Mediation Board does, under the Railway Labor Act, have to decide whether a particular grouping sought by the employees wishing to organize is cognizable as a craft or class. Section 2, Fourth, granting the majority employees of "any craft or class" the right to select

the representative, presupposes that the grouping be *a* recognizable craft or class. If the employees attempted an unreasonable grouping not acceptable as *a* craft or class, the Board could not in conformity with the Act certify a representative for the unit. Whether the employees here involved constituted a cognizable craft or class was the question which the Mediation Board decided in 1947 and, in a sense, reaffirmed in denying ABNE's request (see our opening brief pp. 60–61.) There was no real issue upon this point in the present case. Even United must agree that the unit agreed upon by the Clerks and Machinists is a craft or class. United itself expressed that view in 1947, and the grouping is familiar on other carriers.

We come now to the third category. As long as the personnel involved are employees of the carrier subject to the Act, and as long as a particular grouping or groupings of those employees constitute a cognizable craft or crafts, the Railway Labor Act gives the employees desiring to organize and bargain collectively the substantive right to determine the crafts or classes in which they will organize. Where there is only one union, or where the rival unions are in agreement as to the craft or class to be represented, there is no further issue concerning craft or class for the Mediation Board to determine. It is only when two groups of employees are seeking conflicting bases of self-organization that the Mediation Board has occasion to determine the bargaining unit and then only as an adjunct to deciding who

are the representatives in any dispute between the unions.

In this controversy, there has never been any suggestion that management personnel outside the scope of the Act is being included or that the proposed unit is not a craft or class. The organized employees, speaking through the only two unions, were in agreement on the craft or class to be represented, and there was, therefore, as a matter of substantive law, no issue for the Mediation Board.

The foregoing conclusions, we submit, flow unmistakably from the words of the statute, the legislative history, and the consistent administrative interpretation, as set forth in our opening brief. Neither United nor ABNE has called attention to any contrary indication in the statute, the legislative history, or the course of administration.

There is nothing to the contrary in the materials quoted by United at pages 36–39 of its brief. *UNA Chapter, FEIA* v. *National Mediation Board,* 294 F. 2d 905 (C.A. D.C.), certiorari denied, 368 U.S. 956, was a case in which the competing unions were *in disagreement* upon the constituency in which the election should be conducted. In such a case the Mediation Board has to make the unit determination as an incident to its duty of deciding the dispute between two groups as to who are the representatives designated by a majority of the employees. The government has never suggested the contrary. Our contention is that when the unions are in agreement upon "any craft or class," confining it to employees, then there is no issue for the Board to resolve. Thus, the statements quoted by United miss the mark.

2. United also misunderstands and therefore misstates the practice followed by the Mediation Board with respect to the participation of employers in representation proceedings. The Board's practice with respect to the employer's participation has been consistent for 30 years. As long as the employer is a carrier subject to the Act and the personnel involved are employees subject to the Act, the employer is *never* admitted as a *party* or given the *right* to be heard as a party in a case under Section 2, Ninth. When the Board is called upon to decide whether a particular grouping is a "craft or class," it may need information from the employer, and the employer's views or expert opinion may be taken into account. The same thing may occur when two unions are in dispute about which of two overlapping crafts or classes shall be voted in an election. However, United fails to recognize the distinction, repeatedly made by the Board, between recognizing a *right* of the carrier to be heard (which the Board does not) and *permitting* the carrier to submit information or views when the Board in its discretion believes that such submission will be helpful (which the Board often does). The distinction is made by the Board in the very cases relied upon by United in its brief (pp. 40–43).

Thus, in *In the Matter of Representation of Employees of the KLM Royal Dutch Airlines,* File No. C–2098 (1953), 3 Determination of Craft or Class of the National Mediation Board, p. 1, where one union sought and was granted a hearing on whether a particular grouping of employees constituted "'an appropriate unit' for representation purposes" (p. 2),

and where three other unions participated in the hearing, the Board pointed out in its opinion (p. 2):

> The carrier was represented at the hearing at the request of the Board to present such factual information as might be requested.

For similar statements explaining that a carrier was permitted to be present for the purpose of supplying the Board with whatever information the Board might request, see the following cases cited by United: *In the Matter of Representation of Employees of the United Air Lines, Inc.,* File No. C–2139 (1953), 3 Determination of Craft or Class of the National Mediation Board, p. 9 ("The carrier was represented for the purpose of presenting to the Board such factual evidence as it requested * * *"); *In the Matter of Representation of Employees of the Trans-Texas Airways, Inc.,* File Nos. C–2252 and C–2389 (1956), 3 Determination, pp. 16–17 ("Representatives of both carriers were present and furnished factual information * * *."); *In the Matter of Representation of Employees of the Sabena Belgian World Airlines,* File No. C–2493 (1956), 3 Determination, p. 25; *In the Matter of Representation of Employees of the Trans World Airlines,* File No. C–2506 (1956), 3 Determination, pp. 31, 32; *In the Matter of Representation of Employees of the United Air Lines, Inc.,* File No. C–2508 (1957), 3 Determination, pp. 35, 36; *In the Matter of Representation of Employees of the United Air Lines, Inc.,* File No. C–2946 (1961), 3 Determination, p. 56 (where the hearing was conducted by a Committee rather than the Board, and the Committee invited the carrier to appear "for the purpose of

giving such factual information bearing upon the issue involved as the Committee might request"); *In the Matter of Representation of Employees of the Pan American World Airways, Inc.*, Case No. R–3262 (1958), 3 Determination, pp. 76, 77.

The Board's opinions underscore the distinction between (a) proceedings under Section 2, Ninth, involving questions of the appropriate groupings of employees for bargaining purposes and the identity of their representatives, where the substantive rights are exclusively the employees', and (b) proceedings involving other questions in which the carrier may properly have some interest. In regard to proceedings within the first category, the Board's opinions consistently state that the carriers were invited to attend only to submit such information as the Board might request. But with respect to proceedings in the second category, involving issues such as whether the personnel are employees subject to the Act or whether the employer is a carrier subject to the Act, the Board treats the employer as a party and does not limit its role to merely submitting information. For example, in *In the Matter of Representation of Employees of the Friedkin Aeronautics, Inc.*, File No. C–2200 (1954), 3 Determination, p. 13, the Board gave the employer "full opportunity to introduce evidence * * * and to examine and cross examine witnesses." (*Id.*, p. 13). However, the issue there was whether the Board had jurisdiction over the employer, *i.e.*, whether the employer was a carrier subject to the Act. Obviously the employer has a legally cognizable in-

terest on this point.[3] The Board similarly granted the employers the right to be heard as parties in three cases cited by United where there was a dispute over whether certain personnel were employees subject to the Act or instead were supervisory personnel not covered by the Act.[4] In these cases, also, there was a basic jurisdictional issue as to which the employer would properly have an interest.

In a proceeding under Section 2, Ninth the Board may also decide other issues as to which it permits the employer to participate as a party because the latter has a legally cognizable interest in the question. For example, *In the Matter of Representation of Employees of the American Airlines, Inc.*, File No. C–2380 (1955), 3 Determination, p. 20, which United cites (Br. p. 41), a dispute arose between the carrier and a union over whether certain employees were covered by an existing collective bargaining agreement. The carrier and union were unable to resolve the dispute through a system board of adjustment, and they both requested the NMB to resolve the dis-

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[3] See also, *In the Matter of Representation of Employees of the Pan American World Airways, Inc.*, File No. C–2505 (1956), 3 Determination, p. 27; *In the Matter of Representation of Employees of the Pan American World Airways, Inc.*, File No. C–2564 (1957), 3 Determination, p. 41; *In the Matter of Representation of Employees of the Aircraft Engineering and Maintenance Company*, File No. C–2581 (1958), 3 Determination, p. 45; *In the Matter of Representation of Employees of the Thaddeus Johnson Porter Service, Inc.*, Case No. R–3278 (1958), 3 Determination, p. 82. All of these cases similarly concerned the issue whether the employer was subject to the Act, and the employer was consequently granted the right to be heard.

[4] *Supra*, p. 10.

pute. The means chosen was an application under Section 2, Ninth, by the union to represent the employees. As the Board stated (*Id.*, p. 20), "In an effort to assist the parties to dispose of this controversy, the Board agreed to accept the above described application and hold a hearing on the subject." While employing the form of a Section 2, Ninth representation dispute, the union and carrier were in essence invoking the Board's mediation function under other provisions of the Act. Where the union and employer agree to submit a controversy between them, involving the scope of a contract, to the Board for resolution, treating the employer as a party is not inconsistent with the Board's normal practice in Section 2, Ninth proceedings. Another illustration of the type of issue upon which the NMB permits a carrier to be heard, is found in *In the Matter of Representation of Employees of the Linea Aeropostal Venezolana,* Case No. R-2938 (1955), 3 Determination, p. 54. There, in connection with a representation election conducted pursuant to Section 2, Ninth of the Act, a union charged that the carrier was coercing its employees so that they would not cast ballots; the Board held a hearing at which it permitted the carrier to defend against the charge.

In sum, an examination of the Board's practice as disclosed by the cases cited by United, as well as other cases, demonstrates the lack of merit in United's allegation of administrative inconsistency. Where a case presents those basic issues which Section 2, Ninth was designed to resolve, *i.e.*, the composition of the employees' bargaining units and the identity of their

desired representatives, issues involving rights belonging solely to the employees, the Board does not permit a carrier to participate as a party. Where other questions arise in connection with Section 2, Ninth proceedings, as to which the carrier may have a legally cognizable interest, the National Mediation Board will grant the carrier an opportunity to be heard.

Thus, the statements in our opening brief are both literally and substantially true—the Mediation Board has never recognized a carrier as a party to a proceeding under Section 2, Ninth, in which there was no quasi-jurisdictional question such as whether the unions were seeking to extend collective bargaining to non-employees, and has never sought information or opinions from a carrier in any such case in which the labor organizations were in agreement upon a unit which was indisputably a craft or class.

3. There is no inconsistency between the Mediation Board's holding in *In the Matter of Representation of Employees of Northwest Airlines, Inc.*, Case No. R-2107 (1948), 2 Determination, p. 19, quoted on page 34 of United's brief, and our argument that the Mediation Board has not role to play where the employees seeking to organize are in agreement upon the unit in which they wish to bargain (assuming that it is a craft or class and that there are no other issues). All that the Board held in the cited case is that there is a dispute within the meaning of Section 2, Ninth, if there is uncertainty over a union's claim that a majority have designated it as their representative. While this may show that the dispute necessary to

set the Mediation Board's machinery in motion may be between the organized and unorganized employees, it has not the slightest tendency to support the carrier's claim of interest in the controversy and it in nowise conflicts with the proposition that the choice of a craft or class in which to bargain is for the employees seeking to organize.

Furthermore, United's statement that a carrier's duty to bargain collectively arises only under Section 2, Ninth, is patently contrary to the provisions of the Railway Labor Act. The basic duty to bargain is imposed by Section 2, Second, and again by Section 2, Fourth. Neither is dependent upon a certification.

## CONCLUSION

For the foregoing reasons, as well as the reasons set forth in our opening brief, the judgment of the court of appeals should be reversed in Nos. 138 and 369, and affirmed in No. 139.

Respectfully submitted,

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